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No. 90-244

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

WILLIAM E. COLLINS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITIONER'S REPLY BRIEF

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PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company *
William E. Collins

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* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. THE CONSTITUTIONAL ISSUES WERE ADEQUATELY RAISED BELOW

Respondent's suggestion that petitioner Mass Mutual did not preserve its due process objections to the punitive damages award in this case is patently in error. Respondent concedes, as he must, that Mass Mutual presented its objections both in its answer to Respondent's complaint and in its motion for judgment notwithstanding the verdict or in the alternative for a new trial. Resp. Br. at 6, 8; *see also* Pet. App. 19a-20a. Indeed, at

the JNOV stage, Mass Mutual set forth its objections not only in its motion, but also in its supporting 31-page memorandum, mostly devoted to the due process issues.

Nonetheless, Respondent argues that Mass Mutual waived its due process objection by failing to challenge appropriately the jury instructions used at trial. Resp. Br. at 7-8. The short answer to this is that Mass Mutual specifically objected to the jury instructions used by the trial court, and requested instructions that would have required any punitive damages award to be based on proof beyond a reasonable doubt or on clear and convincing evidence. While Respondent suggests that these efforts were inadequate to preserve the due process issue for appellate review on the ground that they challenged only the standard of proof, and not the breadth of the jury's discretion on punitive damages, *id.*, this distinction is an empty one. Mass Mutual proposed the higher standard of proof precisely to limit the jury's discretion as to the existence and amount of punitive damages. It objected to the jury instructions on due process grounds and proposed alternative instructions to remedy the deficiency. No more was required.

In any event, Respondent's waiver argument misstates both Alabama law and the effect of Alabama law on this Court's review. Under Alabama law, Mass Mutual's presentation of its due process claims as a defense in its pleadings was sufficient to preserve that issue for appellate review. *See Alabama Power Co. v. Capps*, 519 So. 2d 1328, 1330 (Ala.), *appeal dismissed*, 486 U.S. 1002 (1988); *Wallace v. Doege*, 484 So. 2d 404, 405 (Ala. 1986). Thus, Mass Mutual's claims are not procedurally barred under Alabama law, regardless of the form of its objections at trial.

Moreover, even if Mass Mutual had failed entirely to raise its claims prior to the verdict in accordance with state law, that would not have precluded review by this Court *unless* the Alabama courts had refused to review

the due process issue on this basis. This Court has rejected the view that it must independently assess whether a claim was preserved for review in accordance with state procedural standards. Rather, this Court has refused review only where the state court relied on such a state procedural bar as an independent basis for its decision. *See Osborne v. Ohio*, 110 S. Ct. 1691, 1703 (1990); *Harris v. Reed*, 109 S. Ct. 1038, 1045 (1989); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

Here, the Supreme Court of Alabama did not rely on any procedural bar in rejecting Mass Mutual's due process claims. Instead, the Alabama Supreme Court rejected Mass Mutual's due process claims on the merits, citing its earlier decision in *Haslip*, Pet. App. 10a. Moreover, it did so in the face of Respondent's arguments that review of Mass Mutual's due process claims was procedurally barred. Respondent's speculation that the Alabama Supreme Court nevertheless may not have intended to reach all of Mass Mutual's arguments in disposing of its due process challenge on the merits not only has no record basis in this case, but is irrelevant. As noted above, this Court will refuse to reach a federal claim only where the state court expressly relies on a state procedural bar as an independent basis for its decision. Accordingly, Respondent's concession that "the court below did not expressly refer to the Alabama rules in its rejection of petitioner's claim" effectively disposes of this argument.[1]

II. THE VICARIOUS LIABILITY ISSUE PRESENTED HERE IS WORTHY OF REVIEW

Respondent argues that the vicarious liability issue in this case should not be reviewed for three reasons. First,

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[1] Respondent concedes that the jury instruction here "was essentially identical to the one at issue in *Haslip*" and that "[i]t therefore would be appropriate—assuming the Court finds the constitutional issues here to have been properly preserved—to hold this petition pending the decision in *Haslip*." Resp. Br. at 12-13.

Respondent contends that the issue "is not independently worthy of review" because this Court has held that punitive damages are constitutionally permissible under a *respondeat superior* theory. This assertion is most directly refuted by the Court's grant of certiorari to review the similar issue in *Haslip*.

In any event, Respondent's suggestion that prior case law should foreclose review of this issue is hardly convincing. The *only* case Respondent cites in support of this view is a 1927 decision of this Court—*Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). The Alabama statute at issue there authorized punitive damages against an employer for the negligence of its employees *resulting in death*, and was upheld partly on the basis that it was intended to prevent loss of life.[2] In light of (a) the ambiguity as to the intended scope of the *Louis Pizitz Dry Goods Co.* holding, and (b) the expansion of this Court's due process jurisprudence in the intervening six decades, the existence of that case certainly does not eliminate the need for further review.

Respondent's suggestion that Mass Mutual is attempting to raise the vicarious liability issue for the first time in this Court by referring to Thomas Smart, the agent who sold the insurance policy here in question, as an "independent contractor agent" is equally unavailing. Resp.

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[2] As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented.

Louis Pizitz Dry Goods Co., 274 U.S. at 116 (1927).

Br. at 2 n.1. Contrary to Respondent's suggestion, Mass Mutual is not attempting to deny that Smart was its agent. Indeed, Mass Mutual's certiorari petition and its filings in the courts below repeatedly refer to Smart as its "agent." Pet. 2, 3, 9, 10. This reference to Smart as an "independent contractor agent" in its petition is designed only to emphasize that Smart was far less subject to control by Mass Mutual because he was not an employee of the company.[3] The fact that the company did not even know of Smart's actions until after his death heightens the unfairness of the award of punitive damages here.

Finally, Respondent's suggestion that the vicarious liability issue is not here present because Mass Mutual itself was found guilty of misconduct is simply wrong. Under Alabama law, a principal may be held liable in tort for the acts of its agents regardless of whether it authorized or ratified the acts, and indeed regardless of whether it actually forbade them. *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So. 2d 537, 541 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990); *Potomac Leasing Co. v. Bulger*, 531 So. 2d 307 (Ala. 1988); *Autrey v. Blue Cross & Blue Shield of Alabama*, 481 So. 2d 345 (Ala. 1985). While the trial judge held that the evidence supported a finding that "the Defendant's conduct was intentional or reckless,"[4] he did not refer to any conduct

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[3] Contrary to respondent's assertion, there is no basis in the record for the assumption that "the agent was licensed to sell insurance *only* for petitioner." Resp. Br. at 10. The two exhibits cited by respondent do not resolve the question. Exhibit 29 is Mass Mutual's request for a renewal of licenses for a list of agents and Exhibit 31 is a copy of Smart's license for 1984 with the State of Alabama for Mass Mutual. There was no evidence as to the exclusivity of Smart's agency relationship with Mass Mutual.

[4] In ruling on Mass Mutual's JNOV motion, the trial judge stated as follows:

> The jury could have concluded, and the evidence amply supported such conclusion, that the Defendant's conduct was inten-

by Mass Mutual itself, but only to conduct by Smart that Alabama law rendered imputable to Mass Mutual. The trial judge's statement that such conduct "was in furtherance of [Mass Mutual's] ordered corporate policy of updating its old policies," Pet. App. 15a, hardly implies that Mass Mutual approved the use of fraudulent means to achieve those ends. In sum, there was no evidence in the record to indicate that Mass Mutual authorized or ratified Smart's alleged misconduct, nor did the trial judge make such a finding. As a result, this case squarely presents the question whether punitive damages based on vicarious liability are consistent with due process.

III. THE ACTUAL DAMAGES IN THIS CASE ARE NON-EXISTENT OR MINIMAL

In the transaction that led to this litigation, Respondent received from Mass Mutual precisely what he had bargained for: a near seven-fold increase in his insurance coverage from $15,000 to $100,000 with no increase in his monthly premium of $19.51. The cost of the additional coverage was to be financed by policy loans and policy dividends, with the loans being repaid over time from future policy dividends. The loans were to be fully repaid in 2002, when Respondent reached age 54. These facts were fully set forth in a May 9, 1983 letter from agent Smart to Respondent which—as the Alabama Supreme Court found—was erroneously excluded from the jury's consideration. *See* Pet. 3 n.2.[5] Because Respondent

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> tional or reckless and was in furtherance of its ordered corporate policy of updating its old policies which had a guaranteed low interest rate in the event of borrowing against the cash value, by providing a new and higher and more flexible rate and inducing the sale (and resulting commissions) of new insurance by the promise of additional dividends.

Pet. App. 15a.

[5] The letter explained the arrangement to respondent, a bank vice-president, as follows:

received the full value for which he bargained, indeed, a value that he has never disavowed or sought to rescind, he suffered no actual damages.

Contrary to Respondent's description, Mass Mutual does not argue that due process "requires some fixed relationship between compensatory and punitive damages." Resp. Br. at 12. Rather, Mass Mutual contends that due process requires, at a minimum, that punitive damages be reasonably related to actual damages. Here, Respondent argues that he suffered actual damages to the extent of the cash value of his $15,000 policy used to finance the new policy, which coverage he continues to enjoy. Resp. Br. at 11.[6] That cash value totalled between $1,500 and $1,800. Pet. App. 2a. Whether the actual damages in this case are zero, as petitioner argues, or $1,800, as Respondent argues, the $750,000 jury award

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> Under this arrangement, you would be able to purchase as much as $75,000, or perhaps even $85,000 additional coverage. When the cash value of paid additions is all used, you would then leverage current premium payments against future dividends by borrowing against policy guaranteed values. This, of course, would involve policy loans and loan interest. However, under dividend leveraging, the loan interest is *not paid*—you are still paying your same $19.51 a month. When the future dividends exceed the annual premium cost, the excess pays off the loan for you.

The letter was accompanied by a chart setting out projections of the policy dividends and loans for each year through 2002. The text at the bottom of the chart explained, "Additional net premium due, after paid additions are exhausted, is paid from policy loans against guaranteed cash value."

[6] Respondent also refers to the existence of loan liability apart from the loans against the cash value of the policies. Resp. Br. at 11 n.8. That reference is incorrect. The only loans involved were policy loans against the accumulated cash values and dividends of the two policies. At no time would Respondent have any loan liability over and above the value inherent in the policies. Further, those loans would have been fully liquidated over time from dividends on the policies with no additional payment by respondent.

obviously bears no reasonable relation to any actual damages.

The contrast in this regard between the present case and *Haslip* is striking. Unlike Respondent Collins, who had no out-of-pocket expense and whose "loss" was not even alleged to exist other than on paper, the plaintiff in *Haslip* learned in the hospital that her health insurance had been cancelled; consequently, she was liable for $2,500 in medical bills, of which she had to pay $600 to be discharged from the hospital. *Haslip*, 553 So. 2d at 539. Although the $1,040,000 award in *Haslip* is extraordinarily high in relation to the actual damages, there were at least actual damages in that case, unlike the theoretical damages claimed here.[7]

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[7] As for respondent's contention that the availability of post-trial review under the *Hammond* guidelines eliminates the due process issue in this case, it should be noted that this Court considered the due process issue in *Haslip* worthy of consideration despite the fact that those guidelines had been applied in that case. *Haslip*, 553 So. 2d at 543.

As documented in the brief *amicus curiae* of the American Council of Life Insurance and the Health Insurance Association of America ("Amicus Br."), Alabama's review procedure has apparently had little effect. Amicus Br. at 10. That is not surprising, as the *Hammond* guidelines do not purport to serve as the equivalent of constraints on the jury. Rather, they permit a court to order a new trial or remittitur "only where the record establishes that the award is excessive or inadequate *as a matter of law*, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive. . . ." *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986) (emphasis added).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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